

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.

BARRICK GOLD CORPORATION,
Petitioner,

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Elizabeth A. Brown
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v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE
HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE, DEPT. XI,

Respondents,

and

BULLION MONARCH MINING, INC.,

Real Party in Interest.

PETITION FOR WRIT OF PROHIBITION

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the foregoing are persons or entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Petitioner Barrick Gold Corporation does not have a parent corporation and there is no publicly held company that owns 10% or more of Petitioner Barrick Gold Corporation's stock.

Petitioner Barrick Gold Corporation is represented by Pisanelli Bice PLLC and Parsons Behle & Latimer on this writ proceeding and in the proceedings in the district court.

DATED this 24th day of August, 2021.

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ROUTING STATEMENT

This writ petition is presumptively retained by the Nevada Supreme Court because the case originates in business court. NRAP 17(a)(9) (The Supreme Court "shall hear and decide . . . cases originating in business court").

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I. OVERVIEW AND RELIEF SOUGHT

Barrick Gold Corporation ("Barrick Gold") petitions this Court under NRS Chapter 34 and NRAP 21 for a writ of prohibition against the District Court's order entered on April 21, 2021 (the "April 2021 Order") which denied Barrick Gold's motion to dismiss for lack of personal jurisdiction pursuant to NRCP 12(b)(2).¹

Barrick Gold is the ultimate foreign parent company of separately incorporated subsidiaries that, in turn, own and operate mines in Nevada. Barrick Gold's contact with Nevada ends there – indirect ownership of companies involved in this litigation. *For over a decade*, Bullion Monarch Mining, Inc. ("Bullion") has been engaged in litigation with Barrick Gold subsidiaries that own property and operate mines in Nevada over claims that Bullion is owed royalties stemming from an agreement executed in 1979 (the "1979 Agreement"). These subsidiaries were not the original parties to the 1979 Agreement. Instead, Bullion has insisted for nearly a decade that the 1979 Agreement runs with the land; thus, anyone who acquires the underlying Subject Property (defined therein) becomes bound by the 1979 Agreement, along

¹ The April 21, 2021 Order incorporated by reference the district court's order entered on December 9, 2020 (the "December 2020 Order") that denied identical briefing on Barrick Gold's motion for lack of personal jurisdiction prior to an amended complaint being filed. Barrick Gold previously petitioned for a writ of prohibition against the district court's December 2020 Order. While that petition remained pending, Bullion filed an amended complaint in the district court. Barrick Gold sought to supplement the prior writ proceeding with the district court's identical April 2020 Order. However, this Court deemed the petition as moot and instructed Barrick Gold to file a new petition.

with purported royalty obligations on not only the Subject Property, but also a very large surrounding "area of interest" ("AOI") defined in the 1979 Agreement.

It is intuitive then that the purported target of Bullion's claims has always been the entities that actually own the land from which the mineral production occurs. Despite these unassailable facts, Bullion decided to name the ultimate foreign parent, Barrick Gold, as a party and concocted a jurisdictional theory to do so. The district court accepted that distorted theory, which purportedly renders Barrick Gold subject to *specific* personal jurisdiction in Nevada for Bullion's AOI royalty claims, despite Barrick Gold never owning the underlying property.

This novel theory of jurisdiction is based on an unrelated 2019 corporate transaction in which Barrick Gold's indirect subsidiaries' then-assets were contributed to a new joint venture subsidiary. In that transaction, Barrick Gold's indirect subsidiaries reorganized certain operations and assets in Nevada, along with another joint venture partner, into a single entity – Nevada Gold Mines LLC ("NGM") – for increased efficiency. While NGM now holds the property Bullion believes is covered by its AOI royalty claim, the formation of this new joint venture did not expand or alter Bullion's underlying liability claims. Indeed, even in Bullion's operative complaint under review here – the Third Amended Complaint – Bullion claims the NGM formation involved some kind of fraudulent transfer. However, Bullion's fraudulent transfer claim is not levied against Barrick Gold because Nevada law does

not provide accessory liability to nontransferees. In other words, led astray by Bullion, the district court's jurisdictional hook is premised on conduct having no relation to the AOI royalty dispute, which cannot give rise to specific jurisdiction.

Specific jurisdiction is claim specific. Bullion's royalty claims unquestionably do not arise from or relate to the process creating the joint venture subsidiary. There can be no specific jurisdiction over Barrick Gold for Bullion's AOI royalty claims (that it expressly admits arise from the 1979 Agreement) stemming from the formation of a subsidiary joint venture 40 years later. Finally, haling a foreign corporation into a Nevada courthouse on such non-existent contacts is the definition of unreasonable, and Bullion's arguments and the district court's rationale to the contrary are belied by decades of precedent.

Accordingly, Bullion's pending claims against the subsidiaries for proceeds from minerals produced from mines involved in the transaction (mines then and still owned by Barrick Gold's indirect subsidiaries) do not establish specific jurisdiction over the ultimate parent, and the district court's ruling otherwise is unfaithful to controlling law.

Writ relief is necessary and appropriate here to challenge the district court's invalid exercise of personal jurisdiction over Barrick Gold.

II. ISSUE PRESENTED

Whether the district court erred in finding that Barrick Gold, the ultimate parent, is subject to specific personal jurisdiction in Nevada for Bullion's claims seeking royalties on mineral production from mines owned by Barrick Gold's indirect subsidiaries because, in an unrelated 2019 transaction, these subsidiaries transferred their then-existing assets into a newly-formed joint venture subsidiary, which is a named party in the action?

III. FACTS RELEVANT TO UNDERSTANDING THIS PETITION

A. Bullion's Claims Seeking Royalties on Mineral Production Arise from a Purported 1979 Agreement.

Bullion has long insisted that its royalty claims arise from a 1979 Agreement. Bullion claims that the 1979 Agreement runs with the land and thus, anyone who acquires the Subject Property becomes bound by the 1979 Agreement and the purported obligation to pay royalties on mineral production. As Bullion alleges in its Third Amended Complaint ("TAC"), "[i]n 1979, four prospective members of a joint venture negotiated with Bullion to give up both its mining claims in a particularly profitable area and also to refrain from competing for any other property in the surrounding area." PA 1467. The 1979 Agreement has a term of 99 years and supposedly gives Bullion a royalty beginning "with a series of fixed payments up to \$1 million, and [i]s thereafter limited to 1% gross smelter return (GSR) royalty based upon mineral production." PA 1467-68. According to Bullion's theory, anyone who

subsequently acquires property subject to the 1979 Agreement becomes bound by its terms and is obligated to Bullion for royalties on mineral production not only from the Subject Property but also within a vast area of over two hundred and forty square miles (the "Area of Interest" or "AOI").² PA 1468-69.

Bullion's TAC asserts six substantive claims related to the AOI royalties: (1) declaratory judgment; (2) breach of contract; (3) breach of the covenant of good faith and fair dealing; (4) unjust enrichment; (5) fraudulent transfer; and (6) accounting.³ PA 1477-81. Bullion's express allegations in its TAC confirm that all of its claims arise from the purported 1979 Agreement. *See id.*

B. Barrick Gold is the Ultimate Foreign Parent Company.

Barrick Gold is a publicly traded Canadian corporation headquartered in Toronto, Canada. PA 567. It is the ultimate foreign parent company of numerous subsidiaries that own property and conduct mining operations and processing

² The Subject Property and the Area of Interest are both described in the 1979 Agreement. The property purportedly subject to the 1979 Agreement is mostly located in what is known as the Carlin Trend near Elko, Nevada. PA 32-33.

³ Bullion's second amended complaint ("SAC") averred purported claims for "constructive trust" and "alter ego and corporate veil-piercing." But, as the district court has ruled, these are not claims, but rather remedies, and they are premature in this case unless and until a judgment is rendered but uncollected. PA 1250-1257. After the district court granted Bullion leave to amend its SAC, Bullion's TAC added its fraudulent transfer claim. PA 1296-1346. However, and as explained in more depth below, the fraudulent transfer claim is not (nor can it be) levied against Barrick Gold but is instead averred against other Barrick subsidiaries.

activities in various regions and countries around the world. PA 568. None of Barrick Gold's officers live in Nevada, with the majority (all but one) living in Toronto. PA 567. Barrick Gold's Board of Directors holds its meetings mostly, if not exclusively, in Toronto, and Barrick Gold's corporate records are maintained there. *Id.*

Barrick Gold does *not* itself *own any properties or mines*, and it does not itself operate mines or engage in processing activities in Nevada or anywhere else within the United States. PA 567-569. Because Barrick Gold itself does not conduct business in Nevada, Barrick Gold is not (and never has been) registered to do business as a foreign corporation in Nevada. *Id.* Consistent with this fact, Barrick Gold does not have any employees, offices, telephone listings, or any bank accounts in Nevada, and it does not pay any Nevada taxes directly. *Id.*

Rather, Barrick Gold's contact with, and presence in, Nevada is through a lengthy chain of separately incorporated U.S. subsidiaries with their own corporate existences. PA 571-572. When Bullion filed this lawsuit, and up until July 2019, the mines and properties that Bullion alleged were subject to its royalty claims were owned by Barrick Goldstrike Mines, Inc. ("Goldstrike") and Barrick Gold Exploration Inc. ("Exploration"). *Id.* Goldstrike is a wholly owned subsidiary of Exploration. Exploration, in turn, is a wholly owned subsidiary of

ABX Financeco Inc. ("ABX"), and ABX is a wholly owned subsidiary of Barrick Gold.⁴ *Id.*

Like all parent companies, Barrick Gold exerts some degree of supervision over its subsidiaries. *Id.* But Barrick Gold has, for example, never directed the mining operations or processing activities of any of its indirect subsidiaries operating in Nevada. *Id.* Barrick Gold has never directed mining to occur on a particular piece of property. *Id.* Instead, day-to-day management of the various Nevada mining operations is the responsibility of Barrick Gold subsidiaries that historically were in turn managed through a regional structure. *Id.* Therefore, Barrick Gold's involvement is that of a typical parent corporation, including setting general policy and direction for its subsidiaries, monitoring their performance, supervising their budget decisions, requiring approval for large financial transactions and decisions, and issuing consolidated corporate and financial reports. *Id.*

Consistent with its role as the parent to indirect subsidiaries operating in Nevada, Barrick Gold obviously would have some involvement in the early-2019 decision to combine its subsidiaries' mining assets and operations in Nevada with

⁴ Bullion originally named ABX as a defendant in the action but then ***voluntarily dismissed*** ABX after conducting jurisdictional discovery, presumably because that Barrick Gold subsidiary is unconnected to the royalty claims given its position up the corporate ladder. This fact makes Bullion's persistence, and the district court's decision reaching even further up the corporate ladder, all the more perplexing.

those of a competitor, Newmont Goldcorp Corporation ("Newmont"), to form a new joint venture company. Specifically, on March 10, 2019, Barrick Gold and Newmont entered into an Implementation Agreement that caused and governed their respective subsidiaries' contribution and combination of their mining assets and operations in Nevada in the new joint venture that is NGM. PA 660-710. Recognizing this as a perfectly ordinary parent company activity on both their parts, Barrick Gold and Newmont expressly agreed that any disputes flowing from the corporate transactional process would be governed by Canadian law and subject to the jurisdiction of courts of the Province of Ontario. PA 707.

On July 1, 2019, the transaction closed establishing Nevada Gold Mines LLC ("NGM"), a Delaware limited liability company, with a massive mining operation comprising eight mines and their associated infrastructure and processing facilities in Nevada. PA 851-947. All assets and liabilities that were part of the transaction were contributed to and assumed by NGM. PA 675-677. Thus, as it stands today, NGM is the entity that owns the vast land and mineral rights and operates the mines in Nevada from which Bullion claims it is owed an AOI royalty stemming from the 1979 Agreement. PA 675-677, PA 851-947. As such, NGM assumed liability (if any) that may stem from Bullion's AOI royalty claims related to the 1979 Agreement. *Id.*

NGM is owned by Barrick Nevada Holding LLC ("Barrick Holding") and Newmont USA Limited. PA 1041-1042. Barrick Holding, a Delaware limited liability company, maintains a 61.5% membership interest in NGM. *Id.* In turn, various Barrick Gold U.S. subsidiaries, including Goldstrike and Exploration, received a membership interest in Barrick Holding for the conveyance of their respective assets. *Id.* Barrick Gold remains the ultimate parent company of these indirect subsidiaries but owns no direct membership interest in NGM or Barrick Holding, and still does not operate any mines or own any property in Nevada. PA 571-572. All entities remain separate and independent, with their own corporate existence.⁵ *Id.*

C. The Federal Litigation.

1. Bullion stipulates to dismiss Barrick Gold.

In April 2008, Bullion filed an action in the United States District Court, District of Nevada, against Newmont alleging that Newmont was liable to Bullion for AOI royalties on production of mining claims under the 1979 Agreement. PA 577-584. Bullion claimed that Newmont became bound by the terms of the 1979 Agreement on December 23, 1991, when Newmont entered into a joint venture

⁵ Along with Barrick Gold, Bullion has named Goldstrike, Exploration, NGM, and Barrick Holding as defendants. PA 1296-1346.

with High Desert Mineral Resources of Nevada, Inc. ("High Desert") related to mining properties purportedly subject to the 1979 Agreement. *Id.*

Over a year into the litigation, in June 2009, Bullion amended its complaint to name Barrick Gold and Goldstrike as defendants and alleged Goldstrike was liable because it was High Desert's corporate successor. PA 419-427. Bullion's allegations were intentionally vague and merely "lumped together" Barrick Gold and Goldstrike. *Id.* In response, Barrick Gold immediately moved to dismiss for lack of personal jurisdiction. PA 460-481. As is presently the case, Barrick Gold's 2009 motion established that Barrick Gold had no presence in Nevada, had no contacts with Nevada, it maintained all corporate formalities and separateness, and therefore Barrick Gold was not subject to jurisdiction in Nevada. *Id.* Instead of contesting these facts or making any sort of assertion that Barrick Gold was subject to jurisdiction in Nevada, Bullion voluntarily dismissed Barrick Gold. PA 483-484.

2. *Bullion conducts jurisdictional discovery.*

After stipulating to dismiss Barrick Gold, Bullion decided to proceed solely against Goldstrike, the then-owner of certain land and mineral rights that Bullion alleges are subject to the 1979 Agreement.⁶ During this time, Bullion conducted

⁶ The case against Goldstrike was severed and proceeded as a sub-case to Bullion's action against Newmont. In the Newmont case, the federal district court ultimately granted summary judgment against Bullion, finding that Bullion had failed to timely and diligently pursue its claims. PA 630-658.

extensive discovery related to its purported AOI royalty claims arising from the 1979 Agreement. Yet, not once did Bullion claim that Barrick Gold was a necessary or proper party.

In 2017, the federal court was alerted to a subject-matter jurisdictional issue that would render it without jurisdiction because Bullion and Goldstrike were corporate citizens of Utah when the case was first filed. PA 486-494. To fully explore this issue, the federal court granted Bullion wide-ranging jurisdictional discovery. *Id.*

Bullion attempted to use this jurisdictional discovery to suggest that Barrick Gold improperly controlled the activities of its subsidiaries, effectively making its subsidiary's headquarters "Toronto, Canada – the headquarters of [their] ultimate corporate parent." PA 493. The federal court rejected Bullion's contention, finding that the "unrebutted evidence tends to show that [Goldstrike's] executives in Salt Lake City – not Toronto – directed and controlled [Goldstrike's] activities." *Id.* The "unrebutted evidence" alluded to by the federal court derived from the jurisdictional discovery Bullion conducted, which established that Barrick Gold respects its subsidiaries' separate corporate existence and does not improperly control them. PA 498-565.

D. Bullion Refiles in State Court, Barrick Gold Moves to Dismiss, and Bullion Seeks Leave to Amend to Add Newly-Minted Theories of Alter-Ego and Agency.

Following the dismissal of its federal case against Goldstrike, Bullion commenced the underlying action in the Eighth Judicial District Court in December 2018. PA 1-11. Bullion's complaint asserted the same five claims it asserted in the federal case, which Bullion alleged all arise from the 1979 Agreement. *Id.* Remarkably, despite dismissing Barrick Gold long ago, Bullion's complaint sought to once again bring Barrick Gold back into the mix.

Bullion's complaint also named Exploration and ABX as defendants. ABX moved to dismiss for lack of personal jurisdiction, and the district court granted Bullion's request to conduct jurisdictional discovery. PA 42-44. After wasting significant time and energy, the jurisdictional discovery confirmed that ABX was merely an entity in the Barrick corporate family chain with no relation to the asserted claims, and Bullion abandoned ABX as a defendant. PA 344-359. Of course, Barrick Gold is even further removed from Bullion's royalty claims.

As before, the substantive and jurisdictional basis for naming Barrick Gold remains a mystery. The only specific allegations in the complaint about Barrick Gold were: (1) Barrick Gold "is an Ontario corporation doing business in Nevada at all times relevant hereto," and (2) "Barrick Gold is – and at all relevant times was – the 100% owner of ABX [Financeco Inc., another defendant]." PA 2.

After Bullion effectuated service, Barrick Gold moved to dismiss for lack of personal jurisdiction in October 2019.⁷ PA 45-56. Barrick Gold's motion established that Barrick Gold still had no contacts in Nevada sufficient to confer personal jurisdiction. *Id.* In response, Bullion confessed that Barrick Gold itself has no contacts with Nevada (a fact it knows from the jurisdictional discovery it already conducted) but then (and now) insisted that Barrick Gold was subject to jurisdiction in Nevada through its subsidiaries' contacts under either an alter ego or agency theory. PA 186-201. The problem for Bullion: Its complaint failed to allege a single fact to support these newly-contrived contentions.

Acknowledging its defective pleading, Bullion sought leave to (again) amend its complaint to include new allegations to support supposed claims for "constructive trust" and "alter ego and corporate veil-piercing," and name NGM as a defendant. PA 129-185. *Id.* Noting Nevada's liberal policy permitting amendments, the district court ultimately granted Bullion's request to file its proposed amended complaint. PA 336-338.

After filing its amended complaint on June 29, 2020, Bullion sought leave to amend again, to add Barrick Holding – the holding company whose sole purpose is

⁷ Bullion served Barrick Gold through the Hague Convention in Canada on August 29, 2019, as Barrick Gold does not maintain a registered agent in Nevada because it does not conduct business in the state. PA 330-335.

to hold a membership interest in NGM – as a defendant. PA 339-343. The district court again granted Bullion leave to amend on July 14, 2020. *Id.*

E. The District Court's First Jurisdictional Ruling.

After the district court granted Bullion's successive motions for leave to amend, Bullion finally filed its second amended (and then-operative) complaint on July 14, 2020. PA 344-390. Barrick Gold again moved to dismiss for lack of personal jurisdiction. PA 391-414. Bullion argued exclusively that Barrick Gold was purportedly subject to personal jurisdiction through its subsidiaries' contacts and the motion to dismiss highlighted the numerous deficiencies with Bullion's assertions. *Id.*

In response, Bullion suggested for the *first time* that Barrick Gold was directly subject to specific personal jurisdiction in Nevada because of the transaction and formation of NGM. PA 1043-1148. Barrick Gold's reply pointed out the many errors with Bullion's contention, including the fact that Bullion's royalty claims in no way arise from this 2019 transaction, as confirmed by the fact that Bullion named Barrick Gold as a defendant nearly a decade ago, and again in December 2018, for these very same claims relating to the 1979 Agreement. PA 1149-1173.

On September 22, 2020, the district court conducted a hearing on Barrick Gold's motion to dismiss, as well as other pending motions to dismiss, including motions to dismiss Bullion's "claims" for "constructive trust" and

"alter ego and veil-piercing." PA 1174-1249. After hearing arguments, the district court denied Barrick Gold's motion to dismiss, finding that Barrick Gold was subject to specific personal jurisdiction in Nevada for Bullion's claims. PA 1231-1233. The district court ultimately based this decision on the 2019 transaction and formation of NGM *even though Bullion's claims arise from an agreement signed 40 years before NGM's formation. Id.*

On November 19, 2020, the district court entered a written order denying Barrick Gold's motion to dismiss. PA 1250-1257 (the "November 2020 Order"). The district court found that, when Barrick Gold and Newmont entered into the joint venture to create NGM, that transaction included property, some of which the 1979 Agreement and Bullion's royalty claims arise from. *Id.* at 1253. "If royalties are owed," the district court reasoned, "Bullion is a beneficiary under the Nevada Gold Mines joint venture agreement because of the geographic area covered by the joint venture agreement." *Id.* The district court concluded that because Barrick Gold "effectuated the process to create the joint venture agreement" that Barrick Gold "purposefully availed themselves of a Nevada forum." *Id.* at 1254. "In addition, the forum-selection clause in the joint venture agreement shows that it is not unreasonable for the Court to exercise its jurisdiction in this case." *Id.* The notice of entry of order was filed on December 9, 2020, and Barrick Gold promptly filed a petition seeking writ review.

F. NGM's Writ Petition and Bullion's TAC.

On January 22, 2021, Barrick Gold filed its petition seeking writ review from the district court's order denying Barrick Gold's motion to dismiss for lack of personal jurisdiction. PA 1258-1295. Barrick Gold explained that its typical oversight as a parent company is not sufficient for Nevada to assert personal jurisdiction over a foreign defendant. *Id.*

Shortly thereafter, Bullion filed its TAC, which essentially rearranged factual statements and added a fraudulent transfer claim, but the vast majority of Bullion's allegations and claims remained largely unchanged from its SAC. PA 1296-1346. None of these changes conferred personal jurisdiction over Barrick Gold following the district court's November 2020 order.

Nonetheless, Bullion moved in this Court to dismiss Barrick Gold's writ petition as moot due to the filing of its TAC. PA 1347-1406. Barrick Gold opposed and argued that Bullion's TAC did not alter this Court's analysis of the district court's exact same personal jurisdiction decision. PA 1407-1427. Barrick Gold explained that because Bullion's TAC provided only one additional claim of fraudulent transfer, which "is not even levied against Barrick Gold," the claims in the TAC did not alter this Court's review of its writ petition. PA. 1411-14.

In an abundance of caution, and based on Bullion's arguments in its motion to dismiss Barrick Gold's writ petition, Barrick Gold moved in the district court to

dismiss Bullion's TAC on personal jurisdiction grounds. PA 1428-1452. Barrick Gold contended that Bullion's new fraudulent conveyance claim accomplished "nothing to cure th[e] jurisdictional error." PA 1443. This is because "Barrick Gold was neither the transferee nor the transferor" and "'Nevada law does not recognize [fraudulent transfer] claims against nontransferees under theories of accessory liability. '" *Id.* (quoting *Contra Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015)).

Bullion opposed Barrick Gold's motion to dismiss the TAC, relying almost exclusively on the district court's November 2020 Order. PA 1537-44. For example, Bullion explained its TAC did "not disturb this Court's prior jurisdictional analysis." PA 1539. To bootstrap its specific jurisdiction argument, Bullion incorrectly claimed that its "new fraudulent-conveyance claim *bolsters*" the district court's November 2020 decision because "[t]he fraudulent-conveyance claim provides an even more direct connection to Barrick Gold's 2019 joint-venture agreements." PA 1541-42. However, Bullion never addressed this Court's *Cadle Co.* precedent nor rebutted Barrick Gold's arguments explaining that the fraudulent conveyance claim cannot be levied against Barrick Gold as a matter of law. *See generally* PA 1537-44. Bullion only highlighted the forum-selection clause in the 2019 joint venture agreement to claim it would be reasonable to hale a foreign corporation into a Nevada forum. PA 1542-43.

In reply, Barrick Gold pointed out the contradictory positions Bullion staked out in its Motion to Dismiss Barrick Gold's Writ Petition in contrast to its Opposition to Barrick Gold's Motion to Dismiss Bullion's TAC. PA 1545-1551. Without oral argument, the district court denied Barrick Gold's motion to dismiss and later entered an order concluding that "[c]onsistent with the Court's November 19, 2020, order, Barrick Gold has purposefully availed itself of jurisdiction in Nevada."⁸ PA 1552-53.

Following this denial, Barrick Gold moved to supplement its writ petition and appendix to include the district court's order related to the TAC, which relied exclusively on its November 2020 order. PA 1560-1715. On July 15, 2021, this Court determined Barrick Gold's writ petition was moot and that "any such challenge" to the district court's decision regarding personal jurisdiction "must be made via a separate writ petition." PA 1716-17.

Accordingly, Barrick Gold once again petitions this Court for writ relief from the district court's erroneous decision denying Barrick Gold's motion to dismiss Bullion's TAC for lack of personal jurisdiction.⁹

⁸ Of note, the district court's order did not conclude that Bullion's TAC addition of the fraudulent conveyance claim provided a jurisdictional basis for personal jurisdiction purposes. PA 1554-1559.

⁹ The district court's April 2021 Order denied Barrick Gold's motion to dismiss Bullion's TAC and is the order from which Barrick Gold seeks writ review. PA 1552-1553. However, the district court relied almost exclusively on the

IV. REASONS WHY THE REQUESTED WRIT SHOULD ISSUE

A. The District Court's Jurisdictional Ruling Warrants Writ Review.

A writ of prohibition is warranted when a district court acts without or in excess of its jurisdiction. NRS 34.320; *Viega GmbH v. Eighth Jud. Dist. Ct.*, 130 Nev. 368, 373, 328 P.3d 1152, 1156 (2014). The right to appeal is not an adequate and speedy remedy to correct a district court's invalid exercise of personal jurisdiction. *Viega*, 130 Nev. at 374, 328 P.3d at 1156. Thus, it is well settled that writ review is an appropriate method for challenging jurisdictional orders. *Id.* Writ review is plainly necessary and appropriate here.

The Court reviews a district court's order regarding jurisdictional issues de novo when the facts are undisputed. *Baker v. Eighth Jud. Dist. Ct.*, 116 Nev. 527, 531, 999 P.2d 1020, 1023 (2000). Any factual findings regarding personal jurisdiction are reviewed for clear error. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009).

The district court's ruling requiring Barrick Gold to defend claims in Nevada simply because of its role as a parent corporation in *a corporate transaction that is not at issue in the case* cannot stand even under the most deferential standard. The

November 2020 order to conclude Barrick Gold purposefully availed itself based on the 2019 joint venture. PA 1250-57. Thus, the majority of Barrick Gold's analysis is grounded in the November 2020 order.

district court's invalid exercise of jurisdiction over Barrick Gold cannot wait further review. Extraordinary writ relief is appropriate at this time.

B. The District Court Erred in Finding that Barrick Gold is Subject to Specific Personal Jurisdiction.

"The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. ___, ___, 141 S.Ct. 1017, 1024 (2021). "Jurisdiction over a nonresident defendant is proper only if the plaintiff shows that the exercise of jurisdiction satisfies the requirements of Nevada's long-arm statute and does not offend principles of due process." *Viega GmbH*, 130 Nev. at 374, 328 P.3d at 1156.¹⁰ Because Nevada's long-arm statute is coterminous with the federal constitutional limits, a defendant must have "minimum contacts" with Nevada such that it could reasonably anticipate being haled into court in the state, consistent with "traditional notions of fair play and substantial justice." *Arbella v. Mut. Ins. Co. v. Eighth Jud. Dist. Ct.*, 122 Nev. 509, 512, 134 P.3d 710, 712 (2006) (internal quotations omitted). "In giving content to that formulation, the [Supreme] Court has

¹⁰ See also *Bristol-Meyers Squibb*, 137 S. Ct. at 1780 (due process requires assessing "the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. As we have put it, restrictions on personal jurisdiction are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." (citations and internal quotation marks omitted))

long focused on the nature and extent of the 'defendant's relationship to the forum state.'" *Ford Motor Co.*, 141 S. Ct. at 1024.

Unlike a general jurisdiction analysis, "specific jurisdiction is proper only where the cause of action arises from the defendant's contacts with the forum." *Fulbright & Jaworski v. Eighth Jud. Dist. Ct.*, 131 Nev. 30, 35, 342 P.3d 997, 1001 (2015) (internal quotations omitted). Accordingly, for Nevada courts to exercise specific personal jurisdiction over a nonresident defendant: (1) the defendant must purposefully avail itself of the privilege of acting in the forum state or purposefully direct its conduct towards the forum state; and (2) the cause of action must arise from the defendant's purposeful contact or activities in connection with the forum state, such that it is reasonable to exercise personal jurisdiction. *Dogra v. Liles*, 129 Nev. 932, 937, 314 P.3d 952, 955 (2013); *Arbella Mut. Ins. Co.*, 122 Nev. at 513, 134 P.3d at 712-13.¹¹

In the context of the parent-subsidary relationship, there is a distinction between jurisdiction based on the parent company's direct availment and jurisdiction based on the imputed contacts of its subsidiaries, such as by alter ego or an agency theory. *Sonora Diamond Corp. v. Superior Court*, 99 Cal. Rptr. 2d 824, 856

¹¹ Specific jurisdiction is assessed on a claim-by-claim basis. *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 318 n.3 (3d Cir. 2007). Where, as here, the claims sound in contract, courts apply a "purposeful availment" analysis. *See Picot v. Weston*, 780 F.3d 1206, 1212 (9th Cir. 2015).

(Cal. Ct. App. 2000); *Viega GmbH*, 130 Nev. at 375, 328 P.3d at 1157 (recognizing that direct availment is distinct from an imputed-contacts analysis). Under a theory of specific personal jurisdiction directed at a parent corporation, the inquiry "is not whether justification exists to disregard the subsidiary's corporate existence or whether the subsidiary is an agent of the parent but rather whether the parent for all intents and purposes has done an act in the forum state of a nature as to make reasonable the forum state's exercise of jurisdiction over the parent with respect to that act and its consequences." *Sonora*, 99 Cal. Rptr. 2d at 856.

1. The formation of NGM does not establish purposeful availment, nor does Bullion's claims arise from such activity.

The district court's ruling that Barrick Gold purposefully availed itself of jurisdiction in Nevada is contrary to law. Specifically, the district court disregarded controlling law when it determined that Barrick Gold purposefully availed itself as a result of two 2019 agreements: (1) the Implementation Agreement between Barrick Gold and Newmont which integrated their respective subsidiaries' mining assets and operations in Nevada, and (2) the subsequent Limited Liability Agreement, which formed NGM. PA 1554-59 (relying on the November 2020); *see also* PA 1250-57. Bullion's AOI royalty claims do not "arise *in part* from these agreements." *Id.*

"[S]pecific jurisdiction is confined to *adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.*"

Goodyear Dunlop v. Brown, 564 U.S. 915, 919 (2011) (emphasis added). Purposeful availment thus requires that "[t]he cause of action . . . arise from the consequences in the forum state of the defendant's activities." *Consipio Holding, BV v. Carlberg*, 128 Nev. 454, 458, 282 P.3d 751, 755 (2012) (internal quotations omitted).

It is well settled that a parent corporation does not purposefully avail itself of privileges of doing business in Nevada by *forming and owning* an independent subsidiary that conducts business here. *Viega*, 130 Nev. at 381, 328 P.3d at 1160; *Sonora*, 99 Cal. Rptr. 2d at 841-42. The mere fact that Barrick Gold was involved in the "process" and "implementation" of forming NGM is not conduct outside the normal expectation of the parent-subsidiary relationship insufficient for purposeful availment. *Sonora*, 99 Cal. Rptr. 2d at 842 (parent company's involvement in the formation of the mine operation was not conduct outside the normal expectations of the subsidiary relationship); *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 959 F. Supp. 2d 476, 494-495 (S.D.N.Y. 2013) ("[T]his position is contrary to law, as it would subject a foreign holding company to personal jurisdiction wherever it acquired new investments.").

Indeed, as the *Sonora* Court recognized, "when a new business is formed . . . they do not materialize from nothing." *Id.* at 842. Accordingly, it is not out of the ordinary for a parent company to be involved in the process of forming a new venture, including "to contribute its own funds or property, or obligate itself

(directly or as a guarantor) for loans from third parties, for these purposes." *Id.* "That is the essence of an investment, the consideration for which is the ownership interest (such as stock) that the contributor/owner receives in return." *Id.*

To hold otherwise – as the district court did here – swallows this Court's holding in *Viega*, resulting in situations like the present where a parent company is found to have purposefully availed itself of jurisdiction in Nevada, even though those same contacts are insufficient to establish personal jurisdiction over a parent company under an agency theory. *Viega*, 130 Nev. at 378, 328 P.3d at 1158 (parent company's control must be so pervasive that it veers "into management by the exercise of control over the internal affairs of the subsidiary and the determination of how the company will be operated on a day-to-day basis.") If "[n]one of the factors support jurisdiction over [the parent company] on the basis of agency . . . they likewise do not support jurisdiction over [the parent company] on the basis of availment." *Sonora*, 99 Cal. Rptr. 2d at 847.

Simply put, Barrick Gold did not purposefully avail itself of the privileges and laws of Nevada through its involvement as a parent company in the formation of NGM. NGM is a subsidiary of Barrick Gold through a lengthy chain of separately incorporated U.S. subsidiaries, and all are separate and independent entities that comply with their own corporate formalities. PA 567-572, 1041-1042. To this day, in Nevada, Barrick Gold has never registered to do business as a foreign corporation,

never owned property, never paid taxes, does not have any employees, offices, or bank accounts, and does not itself engage in mining or processing activities or operate mining or processing facilities within Nevada. *Id.*

Moreover, contrary to the district court's ruling, Bullion's claims do not (even in the slightest part) arise from the Implementation Agreement and the subsequent Limited Liability Company Agreement forming NGM. *See Arbella*, 122 Nev. at 515-16, 134 P.3d at 714 ("[T]he claims must have a specific and direct relationship or be intimately related to the forum contacts." (internal quotations omitted)). As even Bullion alleged, Bullion's claims – declaratory relief, breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment – *arise from the 1979 Agreement*. PA 344-359. These claims do not arise from the corporate agreements that formed NGM.

Furthermore, Bullion's TAC and its fraudulent transfer claim is not levied at Barrick Gold – because application of that claim to Barrick Gold is contrary to Nevada law. *See* PA 1304 ("Goldstrike, Exploration, *and other Barrick entities* conveyed and transferred all of their mineral interests to Nevada Gold."); *see also Cadle Co.*, 131 Nev. at 120, 345 P.3d 1049, 154 (2015) ("Nevada law does not recognize [fraudulent transfer] claims against nontransferees under theories of accessory liability."). Simply put, Bullion's TAC does not expound on or bolster any new or different jurisdictional connections that would (or could) justify hailing

Barrick Gold into a Nevada court as analyzed by the district court in November. *Compare* PA 344-390 (Pl.'s SAC), *with* PA 1296-1346 (Pl.'s TAC).

The *Sonora* decision cited extensively and favorably by this Court in *Viega* is additionally instructive. There, after determining that the parent corporation, Diamond, was not subject to jurisdiction under an alter ego or agency theory, the court addressed whether the parent was subject directly to specific personal jurisdiction. Importantly, the *Sonora* Court found that Diamond's actions of forming and owning an independent subsidiary, Sonora, for the purpose of conducting business in the forum state, "even if it is assumed such actions constituted purposeful availment (which they did not), cannot provide the basis of specific jurisdiction in this dispute" because those actions (*i.e.*, Diamond's involvement in the process and formation of Sonora) had no relation or connection to plaintiff's claims over a contract with Sonora for endowment payment from the mine. *Sonora*, 99 Cal. Rptr. 2d at 848.

Bullion's claims arise from the 1979 Agreement; not the agreements that led to the creation of NGM. Bullion's own conduct confirms as much. After all, had Bullion's claims arisen from these 2019 agreements, then it would not have named Barrick Gold as a defendant nearly a decade ago in the federal litigation nor included Barrick Gold in the original complaint in this matter in December 2018, months before the agreements were executed. PA 1-11. In addition, Bullion has already

conducted jurisdictional discovery in this case; discovery that led to the voluntary dismissal of ABX after Bullion rashly named it as a defendant.

Moreover, there is nothing in the record that supports the district court's determination that Bullion was supposedly a "beneficiary" of these agreements. *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824-25 (1977) (to be a beneficiary to a contract a party must show a clear intent of the contractual parties to benefit the third party, and the third party's foreseeable reliance on the agreement).¹² But perhaps most importantly for a jurisdictional analysis, the district court's focus on the purported "benefit" to *Bullion* highlights the district court's misplaced analysis. *E.g.*, *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (stating that the Court has "consistently rejected attempts to satisfy the defendant-focused minimum contacts inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State").

2. *The forum selection clause in the unrelated Limited Liability Company Agreement is insufficient to establish reasonableness of exercising personal jurisdiction.*

"[Q]uestions involving personal jurisdiction mandate an inquiry whether it is reasonable to require the defendant to defend *the particular suit* which is brought there." *Trump v. Eighth Jud. Dist. Ct.*, 109 Nev. 687, 700–01, 857 P.2d 740, 749

¹² Indeed, the express terms of the agreement provide that no third party beneficiary was intended. PA 943.

(1993) (citations and quotations omitted) (emphasis added). Rather than consider factors relevant to this inquiry, the district court determined that "the forum-selection clause in the [Limited Liability Company Agreement for NGM] shows that it is not unreasonable for the Court to exercise its jurisdiction in *this* case." PA 1254 (emphasis added).

Respectfully, the forum selection clause in the NGM Limited Liability Company Agreement – an agreement to which Bullion is not a party and has no rights – is hardly relevant to whether it is reasonable for Barrick Gold to defend against Bullion's specific lawsuit seeking AOI royalties pursuant to the 1979 Agreement. *See Asahi Metal Indus. Co., Ltd. v. Superior Ct. of Cali.*, 480 U.S. 102, 114 (1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have *significant weight* in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." (emphasis added)).

The forum selection clause in the NGM Limited Liability Company Agreement expressly provides that "the parties," including Barrick Gold, were *only* agreeing "to the exclusive jurisdiction" in "Nevada" for disputes *among themselves* "*relating to that agreement* and the rights and obligations of the Parties" to that agreement. PA 930 (emphasis added). The mere fact that the parties agreed to jurisdiction in Nevada for disputes between them relating to the NGM Limited Liability Company Agreement (the corporate document that outlines the structure

and operation of NGM) has no bearing on whether it is reasonable to exercise jurisdiction over Barrick Gold for Bullion's pre-existing AOI royalty claims in this lawsuit. The NGM Limited Liability Company Agreement forum selection clause is intended to resolve disputes regarding the structure and operation of NGM between the parties to that specific agreement; not disputes brought by a nonparty to that agreement over unrelated claims that it is owed royalties.

This Court's decision in *Trump* is informative on this point. There, the trust agreement that was a part of the employment contract being sued upon contained a Nevada choice-of-law provision. Thus, the Court determined that defendant "should have reasonably anticipated being haled into court in Nevada" for that particular suit. *Trump*, 109 Nev. at 703, 857 P.2d at 750. Unlike the trust agreement in *Trump* that contained a Nevada choice-of-law provision and was directly related to the employment dispute at issue, here however, Barrick Gold could not reasonably anticipate being haled into court in Nevada for this particular royalty lawsuit as result of the forum selection clause in the entirely unrelated Limited Liability Agreement. *See Bristol-Meyers Squibb Co. v. Superior Ct. of Cal.*, 582 U.S. ____, 137 S. Ct. 1773 at 1782 (2017) ("What is needed – and what is missing here – is a connection between the forum and the specific claims at issue.").

The *Nevada* forum selection clause in the NGM Limited Liability Company Agreement provides no more support to the *reasonableness* of specific jurisdiction

over Barrick Gold in this case than the *Canadian* forum selection clause in the NGM Implementation Agreement supports the *unreasonableness* of exercising specific jurisdiction over Barrick Gold in this case.¹³ Stated slightly differently, neither clause offers any support or tips the scales in either direction. The district court's contrary finding is insufficient under the law.

V. CONCLUSION

For all of the foregoing reasons, Barrick Gold respectfully requests the Court grant the requested writ petition, and enter an order vacating the district court's jurisdictional order and directing the district court to dismiss Barrick Gold.

DATED this 24th day of August, 2021.

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¹³ The Implementation Agreement provides, in relevant part, that each party "submits to the non-exclusive jurisdiction of the courts of the Province of Ontario over any action or proceeding arising out of or relating to this Agreement." PA 707.

VERIFICATION

I, Jordan T. Smith, Esq., declare as follows:

1. I am counsel for the Petitioner. Barrick Gold Corporation.
2. I verify that I have read and compared the foregoing PETITION FOR WRIT OF PROHIBITION and that the same is true to my own knowledge, except for those matters stated on information and belief, and as those matters, I believe them to be true.
3. I declare under the penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

This declaration is executed on 24th day of August, 2021 in Las Vegas, Nevada.

/s/ Jordan T. Smith
JORDAN T. SMITH, ESQ.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Times New Roman.

I certify that I have read this brief and that it complies with the page or type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted, it is proportionately spaced, has a typeface of 14 points or more and 6,976 words.

I further certify that, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Finally, I certify that the Appendix accompanying this brief complies with NRAP 21(a)(4) and NRAP 30 in that the Appendix includes a copy of the District Court's order that is challenged, the pertinent parts of the record before the respondent judge, and other original documents essential to understand the matter set forth in this Petition.

DATED this 24th day of August, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 24th day of August, 2021, I electronically filed and served in the manner indicated below a true and correct copy of the above and foregoing **PETITION FOR WRIT OF PROHIBITION** properly addressed to the following:

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